S.E.A. HOUSING CORP. SDN. BHD.

v.

LEE POH CHOO

FEDERAL COURT, KUALA LUMPUR
SUFFIAN LP
SYED OTHMAN FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 67 OF 1981]
19 MARCH 1982

LAND LAW: *Housing Developers - Agreement to complete building within 18 months - Delay in completion - Acute shortage of contractors, skilled and construction workers at relevant time - General shortage of building materials - Whether caused by circumstances beyond developer's control to exempt liability - Respondent withholds final instalment payment to set off claim for delay in completion - Demand for balance of the damages - Whether respondent committed breach in holding payment of the final instalment.*

By an agreement dated 2 January 1974 the respondent agreed to buy from the appellant a shophouse on lot 25602 1,680 sq. ft. in area in phase 5 in SEA Park, Petaling Jaya, at the price of RM175,000. Under the agreement, the appellant was to complete the said building within 18 months from the date of the agreement, i.e. on or before 1 July 1975. The respondent paid a deposit and settled the rest of the purchase price progressively. The building was not completed until 16 June 1977. It was a term of the said agreement that the appellant should pay liquidated damages at the rate of 8% per annum on the purchase price for any delay in the completion of the said building up to the date of actual completion and delivery of possession.

By a letter dated 16 June 1977 the appellant wrote to the respondent notifying her that the building had been completed and the certificate of fitness was ready for collection. The appellant asked the respondent to pay RM17,907.20 made up as follows:

RM17,500 being the final instalment of the purchase price and RM407.20 being quit rent for the period of 4 years.

The respondent replied that under Clause 17 of the agreement the building was to be completed within 18 months but it was completed 23 months and 15 days later. Further, the respondent asked whether the appellant had obtained any extension of time from the controller of housing and claimed that if no such extension had been given she was entitled to liquidated damages at 8% per annum on the purchase price which according to her calculation amounted to RM27,826.66 i.e. from 2 July 1975 to 1 June 1977. The respondent also stated that the balance of the purchase price being RM17,907.20 payable by her it was far less than her entitlement for liquidated damages. Therefore, she requested the appellant to hand over the keys and pay her RM9,919.46 being the difference between the two amounts.

The appellant replied on 15 August 1977 requesting the respondent to call at its office to discuss the matter. In the meantime, the respondent's solicitors had written to the appellant claiming that the respondent was entitled to set off against the balance of the purchase price the liquidated damages due to the respondent under the agreement and requested the appellant to hand over the keys and pay the respondent the sum of RM9,919.46. The appellant through their solicitors by a letter dated 23 September 1977 replied stating *inter alia* that the payment of the balance purchase price to the appellant and the delivery of the keys and

premises by the appellant and the respondent's claim for damages for alleged delay were two entirely separate issues. The appellant demanded for the balance of the purchase price failing which the respondent would be held fully responsible for any delay in the delivery of the keys to her. He denied any liability to pay damages for the alleged delay in the delivery of vacant possession on the following grounds (in brief):

(i) The alleged delay was caused by circumstances beyond the control of the appellant.

(ii) Apart from acute shortage of contractors, sub-contractors, skilled and semi-skilled labour and construction workers during part of the relevant stage of the construction, there was also at the relevant time a general shortage of building materials, particularly cement.

By a letter dated 30 September 1977 the respondent's solicitors replied that the issues were not separate and the respondent was entitled to damages which could be set off for delay against the balance of the purchase price and demanded the payment of the balance of the damages failing which a writ of summons would be issued against the appellant.

On 10 October 1977, the respondent issued a writ against the appellant claiming:

(a) the sum of RM9,919.46;

(b) loss of rent at RM2,400 per month from 16 June 1977 when the shophouse should have been completed until delivery of possession;

(c) delivery of possession of the shophouse and its keys;

(d) delivery of the issue document of title and various other reliefs.

The appellant admitted by his defence that under the agreement it was required to complete the said building within a period of 18 months from the date of the agreement, that the plaintiff/respondent had paid 90% of the purchase price and that the defendant/appellant should pay the respondent liquidated damages at 8% per annum on the purchase price for any delay in completion of the said building.

However, the appellant claimed protection under Clause 32 of the agreement which exempted the appellant from liability for non-fulfilment of any terms and conditions beyond the appellant's control.

Clause 2 of the agreement reads as follows:

> The Vendor shall not be liable to Purchaser for any failure to fulfil any terms of this Agreement if such fulfilment is delayed, hindered or prevented by *force majeure* including but not limited to acts of god strikes lockouts riots civil commotion acts of war or the disability of contractors and sub-contractors employed by the Vendor either commencing, carrying on or completing their work or failure to obtain any necessary sanction or approval of any local authority or any other circumstances of whatsoever nature beyond the control of the Vendor."

The learned Judicial Commissioner dismissed claim (b) but allowed all other claims. The defendant/appellant appealed from that part of the judgment allowing claims under (a), (c) and (d) while the plaintiff/respondent cross-appealed against the dismissal of her claim under (b).

Three issues which arise before the appeal were:

(1) Is Clause 32 of the agreement valid?

(2) If so, was the learned Judicial Commissioner right in holding that the acute shortage of cement, etc. did not come within Clause 32 such that the defendant is not liable for the delay?

and

(3) Did the plaintiff in withholding payment of the last instalment due commit breach of the agreement?

Held:

[1] It is not open to the developer to escape liability by inserting clause 32 in the agreement. Clause 32 is inconsistent with para. (r) of r. 12(1) of the Housing Developers (Control and Licensing) Rules 1970. Thus it is clear that only terms and conditions designed to comply with the requirements of the rules may be inserted in a contract of sale of land that is governed by the Act and Rules, and that on the contrary terms and conditions which purport to get round the Act and Rules so as to remove the protection of home buyers may not be so inserted.

[2] Clause 32, being inconsistent with r. 12 and not designed to comply with the requirements of the rules and in the absence of waiver or modification by the Controller of Housing under r. 12(2), is void, and that therefore the developer is liable in damages for the delay in completion.

[3] The plaintiff/respondent did not breach the agreement when she withheld payment of the money demanded by the defendant/appellant. The plaintiff's/respondent's cross-claim and the defendant's/appellant's claim arise out of the same transaction and are closely connected with each other's claim, that it would be manifestly unjust to allow the defendant/appellant to enforce payment without taking into account the plaintiff's/respondent's cross-claim.

[4] The damages claimed by the plaintiff/respondent for the delay were capable of quantification under the terms of the agreement in accordance with the provisions of r. 12(1)(r) of the Rules and cannot be in dispute if clause 32 of the agreement if of no effect.

[5] The defendant's/appellant's appeal is dismissed with costs.

[6] As para. (r) of r. 12(1) of the Housing Developers (Control and Licensing) Rules, 1970 precluded the purchaser from recovering under any other head, damages in the event of delay in delivery, the plaintiff's/respondent's cross-appeal is dismissed with costs.

[Both appellant's and respondent's appeal and cross-appeal respectively dismissed with costs.]

Cases referred to:

Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck & Anor. [1978] 2 MLJ 239
Johnson & Anor. v. Mareton [1978] 3 All ER 37
Federal Commerce Ltd. v. Molena Alpha Inc. [1978] 3 WLR 309
Modern Engineering (Bristol) Ltd. v. Gilbert Ash (Northern) Ltd. [1974] AC 689
Dawnays Ltd. v. F.G. Minter Ltd. [1971] 2 All ER 1389

Legislation referred to:

Housing Developers (Control and Licensing) Rules 1970, rr. 12(1)(r), (2)

For the appellant - R.R. Chelliah (David Lingam with him)
For the respondent - R.R. Sethu

JUDGMENT

Suffian LP:

The plaintiff (respondent before us) wanted to buy a shophouse on lot 25602 1,680 sq. ft. in area in phase 5 in SEA Park, Petaling Jaya, from the defendant who is a licensed developer (appellant before us).

a It is common ground that the transaction between the two is governed by the Housing Developers (Control) and Licensing) Act 1966 ("the Act") and the Housing Developers (Control and Licensing) Rules 1970 ("the rules") published as P.U.(A) 268/70.

On 2 January 1974 by a written agreement (ABI) the plaintiff agreed to buy from the defendant the shophouse at the price of RM175,000. Under the agreement the defendant was to complete the said building within 18 months from the date of the agreement, i.e. on or before 1 July *b* 1975. The plaintiff paid a deposit and paid the rest of the purchase price progresively. In fact the building was not completed until 16 June 1977. It is a term of the said agreement that the defendant should pay liquidated damages at the rate of 8% per annum on the purchase price for any delay in the completion of the said building up to the date of actual completion and delivery of possession.

c The following events then happened. By a letter dated 16 June 1977 (AB23) the defendant wrote to the plaintiff notifying her that the building had been completed and the Certificate of Fitness was ready for collection. The defendant asked the plaintiff to pay $17,907.20 made up as follows: RM17,500 being the final instalment of the purchase price and $407.20 being quit rent for a period of 4 years.

d Upon receipt of the abovementioned letter, the plaintiff replied as in AB26, pointing out to the defendant that under Clause 17 of the agreement the building was to be completed within 18 months, but the said building was completed 23 months and 15 days late. Further, the plaintiff asked whether the defendant had obtained any extension of time from the Controller of Housing and claimed that if no extension had been given by the Controller she was entitled to liquidated damages at 8% per annum on the purchase price which according to her calculation amounted to RM27,826.66, i.e. from 2 July 1975 to 1 June 1977.

e

The plaintiff further stated in that letter that the balance of 517,907.20 which was payable by her was far less than the amount to which she was entitled under the agreement a liquidated damages. Therefore she suggested that the defendant should hand over the keys and pay her RM9,919.46, the difference between the two amounts.

f The defendant replied on 15 August 1977 (Exh. AB28) asking the plaintiff to call at its office to discuss the matter.

In the meantime, on 13 August 1977 the plaintiffs solicitors had written to the defendant AB27, claiming that their client was entitled to set off against the balance of the purchase price the liquidated damages due to the plaintiff under the agreement and asking the defendant to hand over the key and pay the plaintiff RM9,919.46.

g Subsequently, the defendant instructed its solicitors who by a letter dated 23 September 1977 (AB34) stated *inter alia* as follows: -

> 2. Our client instructs us that the payment of the balance of the purchase price to our client and the delivery of the keys and premises by our client, and your client's claim for damages for alleged delay are two entirely separate issues. We are instructed to give you notice, which we hereby do, that if your client wishes to obtain delivery of the keys to the *h* promises, she must immediately pay all outstanding sums to our client. If she does not do so, she will be held fully responsible for any delay in the delivery of the keys to her.
>
> 3. With respect to the entirely separate issue of your clients's claim for damages for alleged delay in the completion of the three-storey shophouse, our instructions are as follows.

i

4. Our client instructs us that it denies any liability to pay any damages for the delay in completion alleged by your client. We are instructed to draw your clients attention to the provisions in the Sale and Purchase Agreement including Clause 32. Our client instructs us that the alleged delay in the delivery of vacant possesion, if any (which is hereby denied), was caused by circumstances beyond the control of our client. Apart from the acute shortage of contractors, subcontractors, skilled and semiskilled labour and construction workers during part of the relevant stage of the construction, there was also at the relevant time a general shortage of building materials particularly cement. We are instructed that the acute shortage of contractors etc. referred to above was the result of unforeseen simultaneous commencement and development of several large housing estates in the neighbourhood of our client's development. This large-scale development in the neighbourhood increased the mobility of contractors etc. under the pressure of supply and demand and also created a shortage in absolute terms. With regard to the shortage of building materials, we are instructed that our client was compelled to import cement from overseas sources with the approval of the relevant authorities.

5. Our client instructs us that the schedule in Clause 3 of the Agreement was adopted from the schedule given under the Developers Rules, which was ascertained subsequently to be generally applicable to the sale of link or terrace houses and strictly speaking was not intended for the sale of three-storey of their structure should reflect the difference stages of the construction of a three-storey shophouse. Despite the adoption of a schedule payment disadvantageous to our client could have although our client could have applied to the Controller of Housing for a new schedule at the time of the drafting of the Sale Agreement, our client adhered to the original schedule.

6. In view of what is stated above our client instructs us that your client has no valid grounds to claim for damages for the alleged delay and our client denies any liability there of.

On 30 September 1977, the plaintiffs solicitors replied (AB36) as follows:

> The issues are not separate. By reason of the delay in completion, our client is entitled to damages and what our client is saying is that she sets off the damages for delay against the sum due to your client and demand the payment of the balance of the damages. Both arise out of, the same matter.
>
> The reasons you have advanced cannot be a ground to deny our client's claim for damage for delay.
>
> Our client quite justifiably, has instructed us not to waste time with you and your client on this by further correspondence. Accordingly our client will issue a writ of Summons against your clients. Do you have instructions to accept service.

On 10 October 1977, the plaintiff issued a writ against the defendant. In her statement of claim she said that the agreement is subject to the Housing Development (Control and Licensing) Rules 1970. This is admitted by the defendant in para. 3 of the defence which further avers that the common law and other statute law also apply. The defendant also admits that under the agreement it was required to complete the said building within a period of 18 months from the date of the agreement, that the plaintiff has paid 90% of the purchase price and that the defendant should pay the plaintiff liquidated damages at 8% per annum on the purchase price for any delay in completion of the said building. However, the defendant claims that it is protected by Clause 32 of the agreement which exempted the defendant from liability for non-fulfilment of any terms and conditions of the agreement if such non-fulfilment was caused by circumstances beyond the defendant's control.

The plaintiff claimed

(a) the sum of RM9,919.46;

(b) loss of rent at RM2,400 per month from 16 June 1977 when the shophouse should have been completed until delivery of possession;

(c) delivery of possession of the shophouse and its keys;

(d) delivery of the issue document of title and various other reliefs.

In the event the learned Judicial Commissioner dismissed claim (b) but allowed all other claims.

The developer appealed from that part of the judgment allowing claims under heads (a), (c) and (d), while the plaintiff cross-appealed against that part dismissing her claim under head (b).

Three issues arise before us in the appeal:

(1) Is Clause 32 of the agreement valid?

(2) If so, was the learned Judicial Commissioner right in holding that the acute shortage of cement, etc. did not come within Clause 32 such that the defendant is not liable for the delay? and

(3) Did the plaintiff in withholding payment of the last instalment due, commit breach of the Agreement?

As to the rules which govern the transaction between the parties, r. 12 is relevant. That rule provides that every contract of sale - such as the one here - shall be in writing and shall contain within its terms and conditions provisions to the effect set out in the various paragraphs of that rule. Para. (o) is relevant; that says that the agreement must specify:

> the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall not be later than 18 months after the signing of the contract of sale.

That, as we have seen, was done. Then there is para. (r) which provides that the agreement must contain:

> provisions binding on the'licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall he calculated from day to day at the rate of not less than eight per cent per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale.

That too was done, as we have seen.

But then the developer says, as we have seen, that it is excused from liability by Clause 32 of the agreement which reads:

> The vendor shall not be liable to purchaser for any failure to fulfil any terms of this Agreement if such fulfilment is delayed, hindered or prevented by force *majeure* including but not limited to acts of God strikes lockouts riots civil commotion acts of war or the disability of contractors and subcontractors employed by the vendor either commencing, carrying on or completing their work or failure to obtain any necessary sanction or approval of any local authority or any other circumstances of whatsoever nature beyond the control of the vendor.

It is said here that owing to the then building boom and resultant shortage of building materials and labour which was beyond the control of the developer it is not liable because of this Clause 32.

With great respect to Mr. Chelliah for the developer we do not agree that it is open to the developer to escape liability by inserting Clause 32 in the agreement. It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act. That was why rule 12 was enacted and in particular paras. (o) and (r) thereof. With respect we do not agree with Mr. Chelliah that it was open to a developer' to get round these paragraphs by the inclusion of such a clause as Clause 32 in this agreement.

In *Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck & Anor.* [1918] 2 MLJ 239 we said at p. 243 that developers are bound by the rules and if an agreement of sale is subject to contract,

> only details may be inserted into the further agreement.

Mr. Chelliah argued that Clause 32 is such a detail. With respect we do not agree. In our judgment such details as are inserted into a written agreement must be details consistent, not inconsistent with the Act and rules. Clause 32 is inconsistent with para. (r) of rule 12(1).

When *Daiman* went to the Privy Council(') their Lordships observed at page 60, second column:

> ... it seems to their Lordships that upon the proper construction of the proforma [used in that case] the solicitors [for the developer there] would not be able to include in the contract of sale any term or condition which was not appropriate to effectuate the sale which had been made, including that purpose, of course, provisions to comply with the requirements of the rules."

Thus it is clear that only terms and conditions designed to comply with the requirements of the rules that may be inserted in a contract of *sale* of land that is governed by the Act and rules, and that on the contrary terms and conditions which purport to get round the Act and rules so as to remove the protection of home buyers may not be so inserted.

With respect, the provisions in question here are similar to those in a House of Lords decision, *Johnson & Anor. v. Mareton* [1978] 3 All ER 37 where at page 49 Lord Hailsham said:

> The policy of the law has been repeatedly used to protect the weaker of two parties who do not contract from bargaining positions of equal strength. (line *a*).
>
> The truth is that it can no longer be treated as axiomatic that, in the absence of explicit language, the courts will permit contracting out of the provisions of an Act of Parliament - as was attempted here - where that Act, though silent as to the possibility of contracting out, nevertheless is manifestly passed for the protection of a class of perons who do not negotiate from a position of equal strength, but in whose well-being there is a public as well as a private interest." (line *d* onwards).

It would appear that only "contracting out" in favour of the weaker party - i.e. the purchaser might be countenanced by the Courts.

The construction we place on the rules is not as harsh as it seems to a developer - for he has a safeguard in subrule (2) of rule 12 which provides:

> Notwithstanding the provisions of para. (1) of this Rule, where the Controller [of Housing] is satisfied that owing to special circumstances the compliance with any *provisions of* this Rule is impracticable or unnecessary he may by a certificate in writing waive or modify such provisions in respect of any contract of sale.

Thus in the circumstances of this case it would have been open to the developer to try and persuade the Controller to modify the rigours of paras. (o) and (r) of rule 12(1). If it had succeeded it would have escaped liability. But it made no attempt to do so.

But Mr. Chelliah says that under the terms of rule 12(2) the developer could have done so only before a contract of sale had been finalized and not after. With respect we do not agree; in our judgment it is open to a developer to take advantage of this provision after as well as before such a contract has been finalized.

For the reasons given above, we are of the opinion that Clause 32, being inconsistent with rule 12 and not designed to comply with the requirements of the rules and in the absence of waiver or modification by the Controller of Housing under rule 12(2), is void, and that therefore the developer is liable in damages for the delay in completion.

In view of our conclusion on the first issue, there is no need for us to consider the second issue.

As regards the third issue we are of the opinion that the plaintiff did not breach the agreement when she withheld payment of the money demanded by the defendant.

As was stated by Lord Denning M.R. at pp. 337 & 3388 in *Federal Commerce Ltd. v. Molena Alpha Inc.* [1978] 3 WLR 309:

> It is often necessary to distinguish between a set off or defence properly so called; and a counterclaim or cross-action ...
>
> ... take the, case where a contract gives a creditor a right to take the law into his own hands - to take a particular course of action if a sum is not paid - such as forfeit a lease for non-payment of rent, or to withdraw a vessel for nonpayment of hire. There the distinction between set-off and cross-claim is crucial. When the debtor has a true set off it goes in reduction of the sums owing to the creditor. If the creditor does not allow it to be deducted, he is in peril. He will be liable in damages if he exercises his contractual right of withdrawal wrongly. But when the debtor has no set off or defence property so called, but only a counterclaim or cross-action, then the creditor need not allow any deduction to be made. He can exercise his contractual right without fear; and leave the debtor to bring an action for damages on his counterclaim.
>
> ... But one thing is quite clear; it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to challenge the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

The plaintiff's cross-claim and the defendant's claim arise out of the same transaction and are closely connected with each other. The plaintiffs cross-claim is so closely connected with the defendant's demand that it would be manifestly unjust to allow the defendant to enforce payment without taking into account the plaintiff's cross-claim.

The decision of the House of Lords in *Modern Engineering (Bristol) Ltd. v. Gilbert Ash (Northern)* Ltd. [1974] AC 689 substantiates the position taken by the plaintiff in this matter, and the House in that case disapproved *Dawnays Ltd. v. F.G. Minter Ltd.* [1971] 2 All E.R. 1389; in any event *Dawnays* was decided on the basis that it was not permissible to deduct claims which were unliquidated and still in dispute, which is not the case here. The damages claimed by the plaintiff for the delay were capable of quantification under the terms of the agreement in accordance with the provisions of r. 12(1)(r) of the Rules and cannot be in dispute if Clause 32 of the agreement is of no effect.

For the above reasons we would dismiss the defendant's appeal.

As regards the plaintiff's cross-appeal, from the decision of the learned Judicial Commissioners dismissing her claim under head (b) ie. her claim for loss of rent which she would have received for the shophouse had it been completed within the time stipulated in the agreement, in our judgment the learned Commissioner was right, and we would accordingly dismiss the cross-appeal. We agree with him that there was insufficient evidence to justify the plaintiff's claim.

Before us, Mr. Sethu argued that there was no need at the stage of the trial for him to bring sufficient evidence, as he had asked during the course of his submission in the High Court that if there was a basis for his claim the matter of damages be referred to the Registrar for evidence and determination. We do not think it necessary to consider this argument, because in our judgment para. (r) of r. 12(1) covers this head of claim. The paragraph specifically deals with the indemnity to be paid to the purchaser "for any **delay** in the delivery of the vacant possession of the housing accommodation ... the amount of indemnity ... to be calculated from day to day at the rate of not less than eight per cent per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale." In our judgement, this is intended to be comprehensive - and precludes the purchaser from recovering under any other head damages in the event of delay in delivery as happened here.

To sum up - we dismiss the defendant's appeal with costs.

We also dismiss the plaintift's cross-appeal with costs.

Also found at [1982] CLJ 355